Supreme Court, U.S.
FILED
JUL 5 1994
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(2)

No. 93-1823

In The

# Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI, *et al.*,

*Petitioners,*

v.

KALIMA JENKINS, *et al.*,

*Respondents.*

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

## BRIEF OF RESPONDENTS JENKINS *ET AL.* IN OPPOSITION TO CERTIORARI

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## COUNTER-STATEMENT OF QUESTION PRESENTED

1. Whether, in a school desegregation case, the lower courts erred by requiring defendants – whose constitutional violations were found to have segregated schools and reduced student achievement – to implement educational improvement programs for a period of time sufficient to reduce the educational vestiges of segregation to the extent practicable.

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## BRIEF OF RESPONDENTS JENKINS *ET AL.* IN OPPOSITION TO CERTIORARI

## COUNTER-STATEMENT OF THE CASE

### A. Introduction

Two years ago, this Court established a clear standard to govern the termination of remedial orders in school desegregation cases. The standard focused on the elimination of the vestiges of discrimination to the extent practicable. *Freeman v. Pitts*, 112 S. Ct. 1430, 1446 (1992). Petitioners' officials of the State of Missouri, have never moved the district court to adjudicate their compliance with the *Freeman* standard. In their petition, they do not discuss the widespread constitutional violations the district court found they committed. They do not mention

the pervasive effects of those violations on school segregation, school quality, and school children, found by the district court. They do not fairly describe the carefully phased plan the district court ordered to eliminate those effects to the extent practicable, nor the plan's encouraging but still partial achievement of its remedial goals, nor the additional progress the district court has found to be practicable, nor the planning the district court has required in anticipation of unitary status. Instead, having failed even to attempt to satisfy the *Freeman* test, petitioners ask the Court to replace it with one the Court rejected in *Freeman*, which would treat the instant the entire plan has gone into operation as the moment the district court's authority to monitor the practicable effect of the plan ceases. *Cf. id.* at 1439.

Certiorari is inappropriate here for three reasons. First, the Court recently resolved all the legal questions presented by this case with *Freeman's* adoption of standards generally thought to be favorable to litigants in petitioners' position. And, petitioners have never claimed that they, as yet, can satisfy those standards. Second, the asserted legal issue involving a remedial standard that depends on the achievement of particular test scores is not presented by this case and is based entirely on petitioners' mischaracterization of statements by the courts below. In fact, those statements did nothing more controversial than impose on the district court the obligation to consider all available evidence – including but not limited to indications of educational improvement – in determining whether the educational-harm vestiges of petitioners' century-long violation have been eliminated to the extent practicable. Third, the issue involving funding for teacher salaries asks the Court to intervene in a complex and situation-specific detail of the remedy without acknowledgement of the clear linkage of this aspect



of the remedy to the particular and unique violation found by the courts below, that violation's specific and unique effects, and the inextricable connection (also explicitly detailed in the findings below) between this aspect of the remedy and other aspects that petitioners do not challenge and acknowledge are still necessary.

Because "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation[s]," *Milliken v. Bradley*, 433 U.S. 267, 280 (1977), and because petitioners do not give an accurate picture of the violations, its effects, *or* the remedy,[1] respondent schoolchildren briefly recount the lower courts' violation and effect findings, the extensive record evidence supporting them,[2] the remedy ordered to eliminate the effects where practicable, and the progress towards the remedial goals that has and has not yet been achieved since the remedy went into effect.

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[1] This Court has never reviewed the violations. Previously, the Court declined to review the schoolchildren's petition seeking a broader, interdistrict remedy, *Jenkins v. Missouri*, 484 U.S. 816 (1987), and the State's petition seeking a narrower remedy, 490 U.S. 1034 (1989). This Court has reviewed issues of attorneys fees, 491 U.S. 274 (1989), and funding the remedy, 495 U.S. 33 (1990).

[2] In the course of deliberating on the violations, their effects, and the remedy, the district court has heard evidence from more than 350 witnesses over 160 days, producing a transcript exceeding 60,000 pages; has received more than 80,000 pages of documentary evidence; and has written hundreds of pages of findings and conclusions. *Jenkins v. Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984); *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985, 1986); *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987). These findings were affirmed by the court of appeals. *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (en banc); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988); *Jenkins v. Missouri*, 904 F.2d 415 (8th Cir. 1990).

## B. Overview of the District Court's Findings

Respondent schoolchildren begin by summarizing the district court's violation and effects findings and the remedy it has ordered. In Section C, respondents provide additional detail illustrating the magnitude of the violations and their effects and the scrupulous care with which the district court crafted a remedy for those violations pursuant to standards set by this Court.

* * *

For a century after the Civil War, Missouri racially segregated its schools. The district court found that every "school district in Missouri participated in this dual system," and that the State's intentional segregation of "access" to schools and especially school districts (all but a handful of which were maintained as all-white) had the effect of concentrating blacks within the Kansas City, Missouri School District ("KCMSD"). 593 F. Supp. at 1490.

The court found that Missouri and the KCMSD continued segregating schools and districts in the decades after *Brown v. Board of Education*, 347 U.S. 483 (1954). For example, after the KCMSD could no longer expressly exclude blacks from particular schools, it repeatedly rearranged attendance zones to keep white and black children from attending school together. 593 F. Supp. at 1493. Likewise, when the U.S. Department of Health, Education, and Welfare required KCMSD to desegregate its teaching staff in the 1970s, the district transferred its best and most experienced teachers to white schools, leaving less capable teachers in black and integrated schools. Tr. 3,298-99, 3,304-06. When schools became identified as black, college preparatory classes, especially in math and science, were discontinued and replaced by vocational courses in such subjects as "janitorial services." Tr. at 7018-21, 7338-41, Stip. 75.



The district court detailed the devastating effects of the State's concentration of nearly all black students in the KCMSD, the KCMSD's operation of inferior black schools for a century, and its continued identification of black schools as inferior in the decades after *Brown*. The district court found an "abundance of evidence" that these violations caused white flight to the suburbs. 672 F. Supp. 412. In particular, the State's identification of the KCMSD as the district in the region for blacks, and KCMSD's policy in the decades following *Brown* of causing an ever-increasing segment of its schools to be identified as inferior schools for blacks with substandard teachers, facilities, and curricula, directly "led to white flight from the KCMSD to suburban districts [of a] large number of students . . . " Order, August 25, 1986.

The district court further found that the State's and the KCMSD's pre- and especially post-*Brown* violations, and the white flight the violations caused, created significantly "inferior education" in the district, an "attitude of inferiority among blacks [which] produced low achievement [and] which ultimately limits employment opportunities and causes poverty," 593 F. Supp. at 1492, and "a system-wide *reduction* in student achievement in the schools of KCMSD." 639 F. Supp. at 24 (emphasis in the original). The district court found that the effects of segregation, and particularly the identification of the district's schools as educationally inferior and the "white flight" from those schools, "contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools," 672 F. Supp. at 403. As a result, school facilities within the district "literally rotted," *id.* at 411, further diminishing the levels of educational attainment among students in the district and exacerbating white flight. *Id.* at 403.

To eliminate the effects of these violations, the district court designed a remedial plan with four interconnected parts – educational improvements, capital improvements, voluntary desegregation via magnet schools, and voluntary interdistrict desegregation to be worked out by the State between the KCMSD and suburban school districts that wanted to participate. Petitioners here challenge a few aspects of only the first component of the four-part plan.

The district court designed the educational-improvements component of the remedy with the explicit goal of remedying, to the extent practicable, the "inferior education indigenous of the state-compelled dual school system" in the KCMSD, 593 F. Supp. at 1492, and the "system wide *reduction* in student achievement in the schools of the KCMSD" caused by the dual system, 639 F. Supp. at 24 (emphasis in original). On appeal of the educational improvements portion of the remedy, petitioners primarily challenged the division among the various defendants of the financial obligations for these programs. 807 F.2d at 682. All educational programs were affirmed in 1986 and 1988. Petitioners did not seek certiorari to review the programs it challenges here.

### C. The Specifics of the District Court's Findings and of the Supporting Evidence

#### 1. Pre-1954 Violations and Effects

From 1865 through 1976 Missouri's Constitution required "separate" schools for "children of African descent," and, from 1889 to 1954, the State enforced that provision with statutes making it a criminal offense for "any colored child to attend a white school." Mo. Const. 1945, art. 9, § 1(a). 1889 Mo. Laws 226, expanded in 1909 Mo. Laws 770, 790, 820 to forbid racial integration of even private schools. *See generally Adams v. United States*, 620



F.2d 1277, 1280-81 (8th Cir. 1977) (adopted by reference 593 F. Supp. at 1490).

Unlike other southern states that mandated school segregation, Missouri did not organize its schools into large, county-wide districts. Instead, like most northern states, Missouri distributed its schoolchildren among a vast number of small school districts – over 8,000 in 1948 compared to 546 today. P.Ex. 212. Because Missouri's schools districts were mainly small and poor, they reserved their limited facilities for white children and required black children to seek an education outside the district – almost always without reimbursement for tuition and transportation.[3] As state school superintendents repeatedly reported, blacks were "so widely scattered that it [was] impossible to collect them in sufficient number to warrant the expense of a school" (P.Ex. 208), and the typical "school board [was] not interested in assisting these negro children". P.Ex. K30. *See* 593 F. Supp. at 1490. As a result, school segregation was "driving these people to towns in order to educate their children."[4] P.Ex. K28.

Citing this and other evidence, the district court found "an inextricable connection between schools and housing in the Kansas City area." Because black

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[3] *Board of Educ. v. St. Louis*, 149 S.W.2d 878 (Mo. 1941) (school districts not required to pay for inter-county transfers).

[4] Before 1931, none of the 55 school districts in the three counties around the KCMSD with black students provided any schools or reimbursement for tuition or transportation to KCMSD schools; in 1931, one district started doing so; by 1945 only one other district was doing so; and as late as 1953, after extensive "separate but equal" litigation in the state, still only five districts made such reimbursements. During much of that time, KCMSD tuition amounted to one-fourth of the annual income of an average black family. Tr. 4313-4, 5355-8.

" '[p]eople gravitate[d] toward school facilities,' " the " 'location of [black] schools . . . influence[d] the patterns of residential development of [the] metropolitan area and ha[d] important impact on composition of inner city neighborhoods.' " 593 F. Supp. at 1491 and Order of June 5, 1984 at 101 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971)). Access to schools accordingly was a "major factor" in the sharp decline in the black population in the areas surrounding the KCMSD and the exponential growth in the KCMSD's black population before and after *Brown*.[5] 593 F. Supp. at 1490 (citing Tr. 16,693) (lack of schools for blacks prompted the "depletion of black people from surrounding towns" and their movement into Kansas City). "Undeniably," "blacks moved" out of districts that did not "maintain the state-required separate schools [for blacks] . . . to districts, including the KCMSD, that provided black schools." 593 F. Supp. at 1490.

The district court found that the "intensity" of the "segregation" caused by the violations "is demonstrated by the fact that the average black family [in Kansas City] lives in a census tract that is 85% black while the average white family [in the suburbs] lives in a census tract that is 99% white." *Id.* at 1491.

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[5] Although 21% of black families in the 3-county area lived outside the KCMSD in 1900, that proportion had fallen to 3% by 1954. P.Ex. 53E. Petitioners' own expert demographer demonstrated how school segregation not only drove blacks from nearby rural and suburban areas to the KCMSD but also funneled into that district nearly all of the black families migrating into the metropolitan region from elsewhere. *See* Tr. 22,076, 22,091 (the "existence of a core of blacks caused by [governmental segregation] in the Kansas City area would have long lasting effects [because] . . . blacks tend to move short distances from the core . . . and in-migration [of blacks] tends to focus on that black core as a result of . . . informational networks").



### 2. Post-1954 Violations and Effects

After ninety years of vigorous criminal and civil enforcement of school segregation prior to 1954, Missouri informed local school districts six weeks after *Brown v. Board of Educ.*, 347 U.S. 483 (1954), that they henceforth could make their own decisions about whether, where, and how to educate black students. The State explicitly refrained from requiring desegregation or from ruling that segregated schools are unlawful. P.Ex. 2322 (June 30, 1954 opinion of the Missouri Attorney General).

During the thirty years following *Brown*, segregation continued and increased within the KCMSD.[6] During this period, the KCMSD:

- gerrymandered attendance zones block by block – changing boundaries three hundred times – to assure that the district's black population remained in all-black attendance zones;
- turned schools from all-white to nearly all black in a single year;
- explicitly segregated classrooms within potentially integrated schools by requiring black schoolchildren to walk to the overcrowded elementary school near their home from where they and a black teacher were bused to an under-utilized white school where they were given their own classrooms and their own separate recess and lunch periods;
- encouraged whites in racially transitional schools to transfer to all-white schools;
- consistently selected segregative sites for new schools;

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[6] When this action was filed in 1977, 25 of the pre-1954 one race schools remained 90% or more of the same race and 80% of all blacks in Kansas City attended schools that were 90% or more black. *Jenkins*, 593 F. Supp. at 1492. At trial, in 1984, 24 schools had 90% or more black students, compared to 14 in 1954. *Id.*

- racially targeted faculty assignments; and
- replaced math and science courses in previously all-white schools with courses, for example, in "janitorial services" for the black children newly segregated in those schools (593 F. Supp. at 1493-4. *See also* Ex. K2; Tr. 7018-21, 7338-41, 8624-5, 8969-71, 9419-20; Stipulation 75 of February 21, 1984.).

The district court found that there were substantial and direct demographic effects of branding African-American children as unfit classmates (or even recess- or lunch-mates) and making the education offered blacks in black schools inferior, at the same time as the KCMSD caused an expanding proportion of its schools to be identified as black. While blacks perforce remained segregated in schools in KCMSD, the State's and KCMSD's violations "led to white flight from the KCMSD to suburban districts, [a] large number of students leaving the schools of Kansas City . . . " Order, August 25, 1986 at 1; *See* Tr. 8715-6, 8721-30, 9228-32, 9235 (cited at 593 F. Supp. at 1494); Tr. 17,314-16 (admission by Missouri that KCMSD underwent rapid transformation as "whites fled the district").

The district court also found that Missouri:

- enforced racially restrictive covenants until five years after *Shelley v. Kraemer*, 334 U.S. 1 (1948);
- "encouraged" a racially segregated "dual housing market" in the 1950s - 1970s through a number of discriminatory programs and activities operated by its housing and insurance agencies; and
- explicitly racially segregated relocations of persons displaced by highways and urban renewal programs during the same period (593 F. Supp. at 1491, 1497, 1501-1503).

Together with the State's history of discriminatory actions in regard to schools, housing, marriages and other practices, and KCMSD's continuation of its segregative school



policies in the 1950s, 1960s and 1970s, these specific actions by state agencies within the Kansas City area further segregated schools and "created an atmosphere in which private white individuals could justify their bias . . . against blacks." *Id.* at 1503.

The district court found that the violations caused "inferior" education, *id.*, at 1492, "a system-wide *reduction* in educational achievement, 639 F. Supp. at 24, a decline in the district's educational rating to the lowest in the area, *id.* at 26, system-wide racial isolation of great "intensity", 593 F. Supp. at 1491, and widespread white flight. Order, August 25, 1986, at 1-2. In addition, the court found that the violations diminished the district's financial base. As "many residents of the KCMSD left the district and moved to the suburbs" with their children, the KCMSD was left with a white voting majority that was without children or was unsupportive of the district's mainly black student population and that for nearly two decades "refused to approve a tax levy increase and a bond issue." 672 F. Supp. at 412. As a consequence, the district's schools "literally rotted." *Id.* at 411. As the court of appeals determined, "[t]he findings of fact demonstrate a spiraling effect of white children leaving the KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." 855 F.2d at 1305. Missouri did not appeal these findings.

To remedy the violations and effects, the schoolchildren and the KCMSD proposed a mandatory inter-district plan that would have consolidated or required inter-district transfers between the 75%-black KCMSD and the predominately white surrounding school districts. Plan For Remedying Vestiges, docket no. 1046. Although the plan would have avoided many of the most

expensive educational improvements, capital improvements, magnet, and other components of the remedy eventually ordered, the district court rejected plaintiffs' inter-district proposals. The court did so based on the State's opposition and the court's conclusion that Missouri, and not the suburban school districts, was responsible for the violations' effects in the suburban districts. 593 F. Supp. at 1488; Order, January 25, 1985. An equally divided en banc court of appeals affirmed the denial of interdistrict relief, 807 F.2d 657 (8th Cir. 1986), and this Court denied the schoolchildren's petition for certiorari. 484 U.S. 816 (1987).

### 3. The Ordered Remedy

In devising an intradistrict remedy the district court followed two legal standards – that " 'the scope of the remedy is determined by the nature and extent of the constitutional violation,' " and that the goal of a remedy is to prohibit new violations and eliminate the "vestiges of state imposed segregation." 639 F. Supp. at 23 (citing *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). Having rejected plaintiffs' request for a remedy involving mandatory interdistrict busing or consolidation and Missouri's suggested remedy requiring children to be bused from one part of the 75%-minority KCMSD to another, the district court in 1985 ordered a plan aimed at achieving two goals: (i) removal to the extent practical of the educational deficits to which the State's intentional segregation had subjected black children in the KCMSD and (ii) voluntary integration efforts aimed at reversing some of the



racially segregative effects of the State's violations. *See* 639 F. Supp. 19.[7]

In order to eliminate the educational deficits suffered by black children in the KCMSD, the court directed the district to implement plans to provide small classes, early childhood education, before and after school tutoring programs, summer school, full day kindergarten, library services, and to institute other remedial programs. The court found that such measures were necessary to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 23.

To reduce the racial isolation of KCMSD's black children, the court directed the State to seek the voluntary participation of surrounding districts in a transfer program by which KCMSD's minority students could volunteer to attend school in cooperating school districts nearby.[8] *Id.* at 38. In a survey ordered by the district court, thousands of KCMSD's black families expressed an interest in transferring their children out of the KCMSD to suburban schools. Facilitating such transfers would "provide additional opportunities for desegregated schools [within the KCMSD] as well as desegregative educational experiences for KCMSD students [in surrounding districts]." *Id.* Educating KCMSD's black students in existing classrooms in surrounding districts to

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[7] Two consecutive orders are reported together at 639 F. Supp. 19. The initial remedy order of June 14, 1985 appears at 639 F. Supp. 19-46, *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert denied*, 484 U.S. 816 (1987). A later order appears at 639 F. Supp. 46-56 (June 16, 1986), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in rel. part*, 490 U.S. 1034 (1989).

[8] The City of Kansas City includes all or parts of 13 school districts, including the KCMSD. A dozen other districts are nearby.

which the State's violations previously had propelled the district's white students would have avoided some of the expense of renovating KCMSD's deteriorated schools and of installing costly magnet facilities in the KCMSD to attract white students back from the surrounding districts. 855 F.2d at 1302 (citing Order, November 12, 1986).

Missouri failed to develop a meaningful voluntary transfer plan. In 1986, the court admonished the State for its inaction. 639 F. Supp. at 51. In 1990, after continued inaction by the State, the court of appeals ordered submission of a transfer plan. 904 F.2d at 419. The plan submitted in 1990 resulted in ten KCMSD black students transferring to a single suburban district. App. 20 n.10.

Missouri did not appeal the district court orders to implement the educational remedies, and only appealed the district court's allocation to it of a proportion of the cost of three of the educational programs. *Jenkins*, 807 F.2d at 684. The court of appeals affirmed. *Id.* at 686.

#### 4. Effect of the Remedial Programs

The educational programs, implemented in phases, were fully in place by the fall of 1988. Magnet programs began in various schools in 1986, spreading a grade at a time thereafter, and will be fully implemented in all grades for the first time in 1994-95. The ordered capital improvements are about 70% in place, with several new facilities nearing completion and scheduled to open in 1995. The only component of the remedial plan that has not been substantially implemented is the one for which Missouri was given primary responsibility – voluntary transfers of minority children to suburban schools.

Some meaningful progress has been made in reversing the system-wide reduction in student achievement. In most subject areas at most grade levels, scores on standardized tests have increased. From 1986 to 1992 (the last



year in which data were available to the district court) test scores in reading, language arts and math increased on 25 out of 33 points of comparison, with increases averaging about seven percentile points. App. 131 (finding "trend of improvement in academic achievement"). Other statistical measures of educational progress, including attendance, persistence to graduation, and suspension rates showed modest improvements in recent years.

The academic improvement is notable especially in the earlier grades (K-5) where students scored at or above the 50th percentile on all 25 points of comparison. According to experts for the KCMSD, this trend may be a result of the fact that the district's youngest children – who alone have benefited from the educational programs throughout their school careers – have developed good learning habits, experienced good teaching, and enjoyed school. *Id.* at 129.

In addition to improving statistics, the plan's educational components have improved the lives of individual children. Last year an African-American male graduate of Kansas City's college prep magnet school was awarded Rhodes and Marshall scholarships. An African-American female, currently a senior at the arts magnet school, won the English Speaking Union's Shakespeare contest at Lincoln Center in New York City. Other students have been awarded scholarships at major colleges and universities or received appointments to the service academies, achievements unknown to Kansas City graduates in the two decades and more since the system-wide reduction in student achievement occurred as a result of the constitutional violations in this case. *See, e.g.* KCMSD Ex. 33 (January 27, 1993).

Many KCMSD black children have not yet experienced academic improvements of lasting benefit, however. About a quarter of KCMSD's students remain among the lowest achieving students in the nation. KCMSD Exs. 28A, 28B (January 27, 1993). While improved, the persistence to graduation rate remains low, with substantial numbers of high school students dropping out before graduation. Following hearings, both courts below found that academic improvements remain practicable for these children. The district court found that, although "there has been a clear trend of improvement in academic achievement in the KCMSD, . . . the District has [not] reached anywhere close to its maximum potential" on that aspect of the remedial goal. App. 131. The district court also found that

> the *Milliken II* [*i.e.*, educational improvement] components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet met these goals in their entirety. The court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time.

App. 112-13. The court of appeals affirmed this finding because "evidence in the record fell far short of establishing that [the educational harm] vestiges had been eliminated to the extent practicable." App. 19. The district court also found that maintaining at least the existing levels of educational achievement within the KCMSD is critical to the success of the plan's programs to remedy the racial-isolation effects of the violations within the district.

Meaningful progress has been made in eliminating racial isolation in Kansas City schools. In 1985-86, before the magnet school programs were implemented, 51.5% of the KCMSD's total elementary enrollment attended nine



schools with at least 90% minority enrollment. This year all nine schools have less than 90% minority enrollment, and only 28.5% of district elementary enrollment is in severely segregated schools. In schools with magnet programs, the number of severely segregated students (4,012 in 1985) has been reduced to zero. *See, e.g.*, App. 129. The percentage of minority students in severely isolated middle schools has fallen from 45.2% to 22.0% and in high school from 42.1% to 20.3%. Segregation is expected to decline further this coming Fall, when the last magnet programs reach full implementation.

Most of this progress has been achieved voluntarily, by attracting white students to magnet schools with outstanding and distinctive programs located in schools in the central city. For instance, Martin Luther King, Jr. Latin Grammar Middle School – where children wear uniforms, follow a strict discipline code, study Latin and sign contracts with parents and the school to do extra homework – has gone from all-black in 1985-86 to 30.3% nonminority this year. Knotts Environmental Science Elementary School has gone from having virtually no nonminority students to having nearly 30% today. Banneker, a computers-intensive elementary school replaced an all-black school with a new and larger facility and in five years has attracted a 35% nonminority enrollment.

For the most part, Kansas City's magnet schools follow an admissions policy that seeks to move enrollment voluntarily, by 2% each year, toward 35% nonminority. The progress achieved to date has come in part from the voluntary choices of students and their parents, and in part by attracting nearly 2,000 new white students, out of a district enrollment of 37,000, from private and suburban schools. Additional new students have been attracted each year, and the district court found in 1993 that even

more progress toward integration remained practicable. App. 129. The State did not appeal that finding.

In its order approving magnet schools, the district court noted that the educational improvements plan has two purposes – seeing that black "victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while simultaneously establishing an environment designed to maintain and attract non-minority enrollment." *Jenkins*, 639 F. Supp. at 54. The court of appeals agreed, noting that the

> foundation of the [remedial] plans adopted was the idea that improving the KCMSD as a system would at the same time compensate blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools.

*Jenkins*, 855 F.2d at 1301. After holding hearings last year, the district court concluded that, in practice as well as in the design, the educational improvements programs have served as an "integral part of the overall desegregation remedy." App. at 112. The Eighth Circuit affirmed, citing the interdependence of the challenged components of the remedy and of the remedy's other, unchallenged, components as an additional reason why Missouri had not met its burden of showing the appropriateness of ending the educational improvements programs. App. 19.

For the first time this coming Fall, all components of the ordered remedy, save the State's voluntary interdistrict component, will be in operation at all grade levels. Recognizing that implementation was in process, the district court recently has raised the prospect of unitary status and asked the parties to begin planning for it. Last year, for example, the district court ordered the submission of plans that assumed a phase out of State funding for the desegregation plan beginning in three



years. App. 140-41. Those plans will be reviewed by the district court at an upcoming hearing.

## REASONS FOR DENYING THE WRIT

Neither of the questions that the petition presents asks the Court to review the findings of the two courts below that the educational improvements components of the remedy have failed to achieve unitary status. Nor could petitioners present that "partial unitary status" question, given that even the dissenters from the denial of *en banc* consideration below concluded that the record did not establish partial unitary status. App. 58. Nor would such a question warrant certiorari in any event, even assuming it were presented and that the record supported the petitioners' side of it, because the question turns on the application of the well-established rule of *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), to a factually unique set of violations and effects and a *sui generis* remedy ordered to cure those effects. Nonetheless, in the guise of asking for the Court's review on a question concerning standardized test scores – a question the case does not present because it posits a unitariness standard that neither court below endorsed or applied – petitioners in effect ask the Court to address a question they do not present, on the basis of evidence they did not offer below, in an effort to convince the Court to adopt a unitariness standard that it rejected only two years ago in *Freeman*. Below, respondent schoolchildren demonstrate why the questions actually presented do not warrant certiorari, why the petitioners did not and could not present any question of unitariness under the *Freeman* standard, and why the implicit burden of the petition is that school desegregation should end when it begins.

## I. NEITHER COURT BELOW ADOPTED A STANDARDIZED TEST SCORE MEASURE OF REMEDIAL EFFECTIVENESS.

Complaining about the expense of remedies it did not appeal that were necessitated by violations it has admitted, and faced with implementing orders that faithfully adhere to this Court's doctrinal mandates, Missouri poses as its first question an issue that the case does not present. Thus, contrary to the State's assertion, Pet. 2, the courts below did not adopt a requirement that mandated the use of standardized test scores to measure remedial effectiveness in determining unitary status. *See* Brief of Respondents KCMSD and American Federation of Teachers Local 691 at I.A. Noting the district court's finding that Missouri's violation caused a "system-wide *reduction* in student achievement", 639 F. Supp. at 24 (emphasis in original), the court of appeals simply restated the long-recognized principles that remedies must eliminate effects of segregation to the extent practicable, *Bd. of Education v. Dowell*, 111 S. Ct. 630, 638 (1991), and that the measure of a remedy is its effectiveness, not its purpose, *Dayton Board of Education v. Brinkman*, 443 U.S. 528, 538 (1979). App. 21. Faced with the particular violation and its particular effects, the court of appeals then simply concluded that it will take time to remedy the system-wide reduction in student achievement in the KCMSD schools. *Id.* These statements raise no issues worthy of the Court's review.

Nor is there any support in the extensive remedial history of this case for the straw figure the State erects. Rather, from its first remedy order in 1985, the district court has adhered closely to the limitations this Court has imposed on school desegregation remedies. The district court made findings of fact that linked violations to effects and linked effects to each component of the remedy it ordered. Specifically, the court found intentional



segregation of blacks in the KCMSD and intentional degradation of the district's education program. The district court then found that these violations caused an "intense[]" concentration of blacks within the KCMSD, "inferior" education, and a system-wide *reduction* in student achievement", 639 F. Supp. at 24, which in turn caused "large numbers" of whites to flee from the KCMSD to suburban districts. Order of August 25, 1986.

The court then found *universal agreement* on educational improvement programs to remedy the violations and eliminate their effects. "No party to this case has suggested that this [remedial] plan should not contain components designed to improve educational achievement." 639 F. Supp. at 24. The State of Missouri thus "endorse[d]" many of the educational programs it now challenges, including "reduced class size, summer school, full day kindergarten, before and after school tutoring and early childhood development programs". *Id.* at 26. As originally proposed by the State, and as adopted by the district court, moreover, these programs were intended not as a one-time-only opportunity for a few students but to "increase student achievement", and thereby remedy the "system-wide *reduction* in student achievement" caused by segregation. *Id.* at 24. None of these fact findings, most of which were invited by Missouri, has ever been challenged by the State.

In reviewing the remedy orders, the court of appeals relied on these same well-established legal principles, 855 F.2d at 1299, approved the district court's fact findings, and affirmed the remedy.

Because the parties are in agreement on applicable legal standards, because those standards premise an appropriate remedy on the district court's findings of violations, effects and necessary measures to cure those effects, and because the district court made, and the court

of appeals affirmed, and in most cases the State never appealed the requisite findings, the remedial orders present no question meriting relief.

## II. PARTIAL UNITARY STATUS UNDER THE RULE OF *FREEMAN* IS UNWORTHY OF CERTIORARI BECAUSE THE PETITIONERS DO NOT PRESENT THE QUESTION AND BECAUSE IT IS A FACT-BOUND MATTER THAT WAS UNANIMOUSLY RESOLVED AGAINST PETITIONERS BY BOTH COURTS BELOW.

The petition presents no question concerning partial unitary status. Even if it did, the case raises no new or important constitutional issues in that vein. The three-part "partial unitariness" standard in *Freeman* turns on various factual questions, all of which were answered without disagreement by the courts below. And the State neither challenges the relevant findings as clearly erroneous nor argues that the district court abused its discretion.

First, additional educational improvements are practicable. *See Freeman* at 1446. The district court has explicitly found that while there has been a "trend of improvement", the school district is "not anywhere close to its maximum potential." App. 131. The court of appeals agreed that "[t]he evidence on the record fell far short of establishing that such [educational and racial isolation] vestiges had been eliminated to the extent practicable." App. 19. On this ground alone, *Freeman* forbids a unitariness finding here.

Second, the educational components of the remedy – the only ones challenged here by the State – cannot be withdrawn without undermining the plan's remaining components. *See Freeman* at 1446. Despite having the burden of proof, the State made no attempt to demonstrate in either of the courts below that discontinuance of funding



for the educational programs would not adversely affect the "other facets" of the remedy, most particularly the magnet school programs designed to reduce racial isolation in KCMSD schools. The district court has repeatedly found an inextricable connection between the educational programs and the magnet schools, 639 F. Supp. at 54, most recently concluding that the educational programs remain an "integral part" of the plan's desegregation component. App. 112. The court of appeals agreed. App. 18. By not presenting any evidence below supporting a contrary finding, the State cannot overcome this second sufficient justification under *Freeman* for continuing the educational programs.

Finally, *Freeman* requires that the State establish that it has in good faith complied with the orders of the district court. *See Freeman*, 112 S.Ct. at 1446. As the court of appeals noted, and the State does not challenge, "[t]he State did not try to prove that it has demonstrated a good faith commitment to the whole of the court's decree." App. 19. Also on this basis alone, the State is not entitled to a declaration of partial unitary status.

In fact, the State's attention to its remedial responsibilities evidences less than good faith. The district court's findings of unconstitutional school segregation placed the State of Missouri immediately under an "affirmative duty to take whatever steps might be necessary" to cure the segregative, educational, and other effects of that violation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459 (1979) (quoting *Green v. County School Bd.*, 391 U.S. 430, 437-438 (1968)). Yet, the State repeatedly has refused to take such steps voluntarily or even to propose them when ordered to do so.

For example, in 1985, when the district court invited plans for magnet schools, 639 F. Supp. at 34, Missouri chose to submit no plan whatsoever, leaving the district

court with no alternative but to work from KCMSD's and the plaintiffs' joint plan. Also in 1985, the court asked the State to use its good offices to establish a transfer plan for minorities to attend school in volunteering suburban school districts. 639 F. Supp. at 38. Again, the State did not act, even though such a plan would have greatly reduced the cost of the voluntary KCMSD plan about which it complains. Seven years later the court of appeals noted that it had "stressed repeatedly" but without results the need for such a voluntary transfer plan, App. 20 n. 10, the main responsibility for which remained with the State.

Similarly, when the district court in 1987 sought suggestions for helping the KCMSD fund its share of the desegregation costs, the State offered no plan and expressed no opposition to the schoolchildren's motion for a court-ordered tax increase, even while insisting that means be found to enable the school district to pay its share. Yet, when the district court adopted the only proposal before it, in which the State previously had acquiesced, the State objected and brought the matter to this Court – still without alternative suggestions. The State thus has not attempted to prove its good faith commitment to the whole of the district court's decree, App. 19, because the facts permit no such demonstration.

The State seems to argue that, even if all three *Freeman* standards forbid a unitariness conclusion, the Court still should find the plan unitary because it is expensive. Although this issue is not before the Court, it deserves an answer. In the careful exercise of its discretion, the district court rejected the schoolchildren's request for a mandatory interdistrict plan as excessively intrusive on the interests of innocent individuals and suburban school districts. It then rejected the State's proposal for forced



intradistrict busing within a 75% minority district reeling from segregation-induced white flight, noting that the inevitable effect of the State's plan would have been *more* segregation. 639 F. Supp. at 35-38. Instead the district court ordered a less intrusive remedy: academic programs to remedy the segregation-caused inferior education available to students in the mostly minority KCMSD as approved by this Court in *Milliken v. Bradley II*, 433 U.S. 267 (1977); voluntary transfers of nonminorities to magnet schools; and refurbished buildings to reverse some of the physical, educational, and segregative effects of the State's violations.

The district court had no choice but to reject the State's *intra*district busing plan on remedial ineffectiveness grounds. It is true that among the remaining two plans (the one adopted and plaintiffs' mandatory *inter*district plan), the court chose the more expensive.[9] It is also true, as plaintiffs have repeatedly made clear to the district court, that this remedy is less satisfactory to them – because it is less immediately effective – than a mandatory interdistrict consolidation or transfer plan. But the plan the court chose has another virtue, which is legally

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[9] The plan is not as expensive as the petition claims. Pet. at 6. The figure the State gives is without citation to the record but surely includes capital expenditures expensed in a single year though the benefits will be reaped for decades. No school district in the nation accounts for its capital expenditures as the State would for KCMSD's. The more appropriate measure is the annual per capita cost of education in KCMSD, including all operating and desegregation expenses, which is about $7,900. KCMSD Operating and Desegregative Budgets, 1993-94. This figure is significantly lower than in the mostly white, suburban school districts in Missouri. The expenditures in Kansas City are remarkable in only one respect: they take place in a central-city, mostly African-American school district.

decisive under this Court's remedial-effectiveness decision in *Green*, 391 U.S. at 437-438, and its remedial-limits decision in *Milliken*, 433 U.S. at 280, as interpreted by the district court: Among all available plans, the one the court imposed is the only one that holds out even a hope of removing the vestiges of the State's violations and, at the same time, does not mandatorily involve school districts and schoolchildren not responsible for those violations. The district court can hardly be said to have abused its discretion in selecting the only educationally and desegregatively effective option that was available.

Besides, the remedy is working for many students. Nearly two thousand children from suburban and private schools chose last year to leave their former schools and enroll voluntarily in the 37,000 student, mostly minority, school district. Many formerly all-black schools have moved steadily and voluntarily toward significant racial integration. Thousands of students are learning foreign languages through full immersion instruction. Thousands are computer literate. Many are winning regional and national recognition for their academic accomplishments. Test scores are up significantly in the elementary schools where the children have had the full benefit of the educational programs in place just since 1988. Progress in science has been strong in nearly all grades. At all levels the KCMSD has demonstrated some degree of progress.

Much, however, remains to be accomplished. As the lower courts both found, additional progress toward the constitutionally mandated goal of eliminating the vestiges of petitioners' violation remains "practicable" and well within the reach of the plan, App. 21, 131.



## III. THE STATE CONTENDS THAT IT SHOULD BE RELEASED FROM ITS REMEDIAL OBLIGATIONS UNDER *FREEMAN* BASED ON A PRINCIPLE THAT *FREEMAN* REJECTED.

Because the State did not file a motion in the district court seeking a declaration under *Freeman* (1) that the educational programs had been implemented for a reasonable period of time, (2) that they may be severed from the other components of the remedy, and (3) that their implementation satisfies Missouri's obligations to assist the school district in achieving unitary status, the "partial unitariness" issue is not properly before this Court. *See Freeman*, at 1445-1446. If the question *were* before the Court, it would present only matters of fact, given the district court's findings, affirmed on appeal and not challenged here as erroneous, that the educational programs are essential to curing the educational effects of the violation and to the success of the overall desegregation plan, 639 F. Supp. at 54, *aff'd* 855 F.2d at 1301; that those programs may not be severed from the rest of the plan but are an "integral part" of it, App. at 112; that those programs are having some initial success in improving education and desegregation, App. at 131, 112; and that additional remedial gains are practicable, App. at 131.

Where the district court has specifically found that the State's own "endorsed" educational parts of the remedy have not yet eliminated the vestiges of past discrimination to the extent practicable, and where it has found that those parts are integrally intertwined with other aspects of the overall remedial plan, the court's refusal to exercise its discretion to declare the educational programs unitary is unexceptionably proper. The affirmance by the court of appeals of the district court's exercise of its discretion is likewise unexceptional and presents no interesting question for this Court's plenary review.

Boiled down to its essence, therefore, Missouri's claim is that the Court should abandon the *Freeman* standard and adopt a standard that *Freeman* explicitly rejects. Missouri thus contends that, once having fully put in place educational programs designed to eliminate the reduced academic achievement that the violations caused, those very programs may immediately be abandoned regardless of whether they have yet been effective. In Missouri's view, full implementation, for even an instant, not effectiveness, is the measure of a defendant's remedial responsibility. Because this Court so recently rejected the State's notion that upon mere implementation of remedial orders the wrongdoer is entitled to a declaration of partial unitary status as to the subject matter of the orders implemented, and because the Court so recently concluded that, as a threshold, orders must be implemented "for a reasonable period of time", *Freeman* at 1439, there is no basis to grant certiorari here.

## IV. THE SALARY ISSUE RAISED BY THE STATE DOES NOT WARRANT REVIEW BECAUSE IT DEPENDS UPON FACTS FOUND BY TWO COURTS BELOW, IS INEXTRICABLY RELATED TO UNCHALLENGED COMPONENTS OF THE REMEDY, AND IS THE KIND OF REMEDIAL DETAIL THAT IS BEST LEFT TO THE DISCRETION OF THE DISTRICT COURT.

In rejecting requests to adopt a less expensive but more intrusive mandatory interdistrict remedy, and in ordering a primarily voluntary but more costly remedy, the district court necessarily had to address complex implementation issues. One of those issues was the need to remedy the under-funding of schools caused by the violations and KCMSD's consequent inability to pay teachers even marginally competitive salaries. After the State rebuffed the district court's initial request that it



give the KCMSD more "versatility" in funding its educational and desegregative needs, Order of November 12, 1986 at 7, the district court unavoidably had to face the issue of providing salaries sufficient to prevent the otherwise certain loss of KCMSD's most skilled and experienced teachers and staff. 672 F. Supp. at 403, 410. Based on these findings, and recognizing the critical necessity in a voluntary plan of retaining staff capable of implementing the educational improvement and magnet schools components of the remedy, the district court ordered that salaries be supplemented. *Id.* The State did not appeal this order.

Now, however, the State challenges a subsequent salary order needed to implement the prior order. In doing so, it runs squarely into fact findings made by both courts below that the subsequent order was essential to the success of the remedial plan. App. 87.

In a voluntary remedial scheme, in which teachers and staff alike are expected to implement new programs, learn new teaching styles, do their jobs in the midst of construction and renovation activities, keep buildings clean and attractive for prospective parents in KCMSD's "Schools of Choice" system of magnet schools, and maintain the security of buildings, people, and property, it was not clearly erroneous for the district court to conclude that nearly (but still not entirely) competitive salaries were essential to the implementation of the remedies. Nor was it clearly erroneous for the courts below to conclude that all employees, either because of their roles in the desegregation remedy or to avoid a two-tiered, morale destroying, salary system that would impede effective implementation of the remedy, necessarily required salary increases to assure the effectiveness of this desegregation plan. The State thus asks the Court to engage in

second guessing of the lower courts as to factual determinations made in the process of fine-tuning an aspect of the plan that is critical to all other aspects and to which the State has never objected in principle. Because no important issues emerge from the findings and exercise of discretion below, there is no reason for this Court to review them.

## CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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July 5, 1994